Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER,

-vs-

KIMBERLY I. SANDERS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the Sixth Amendment right to counsel attach to the decision of whether to consent to blood alcohol testing during a drunk driving investigation?

2. Is the proper remedy for a violation of the Sixth Amendment right to counsel dismissal of the charges rather than suppression?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

STATEMENT OF JURISDICTION 2

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS WHY THE WRIT SHOULD ISSUE

I

THERE IS A SUBSTANTIAL CONFLICT WHETHER THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL ATTACHES TO THE DECISION WHETHER TO SUBMIT TO BLOOD-ALCOHOL TESTING 7

II

THIS COURT SHOULD GRANT REVIEW TO DECIDE THE SUBSTANTIAL FEDERAL QUESTION IF WHETHER THE SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHES AS ESPOUSED BY THE MINORITY, THE PROPER REMEDY IS SUPPRESSION RATHER THAN DISMISSAL 11

CONCLUSION 13

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

TABLE OF AUTHORITIES

CASES — PAGE

Albrecht v. Director of Revenue
833 S.W.2d 40 (Mo. App. 1992) 9

Brank v. State of Delaware
528 A.2d 1185 (Del. 1987) 8

Brosan v. Cochran
516 A.2d 970 (Md. 1986) 9, 10

Commonwealth v. Brazelton
537 N.E.2d 142 (Mass. 1989) 9

Cook v. State of Texas
940 S.W.2d 623 (Tex. Crim. App. 1996) 12

Copelin v. State
659 P.2d 1206 (Alaska 1983) 9, 10

Davis v. Pope
197 S.E.2d 861 (Ga. 1973) 9

Department of Pub. Safety v. Gates
350 N.W.2d 59 (S.D. 1984) 9

Dobbins v. Ohio Bureau of Motor Vehicles
664 N.E.2d 908 (Ohio 1996) 9

Escobedo v. Illinois
378 U.S. 478 (1964) 11

Espinoza v. Superior Court
166 Ariz. 557, 804 P.2d 90 (1991) 7

Gilbert v. California
388 U.S. 263 (1967) 10, 12

Hopfmann v. Connolly
471 U.S. 459, 105 S. Ct. 2106 (1985) 8

In re Kean
520 A.2d 1271 (R.I. 1987) 9

Kirby v. Illinois
406 U.S. 682 (1972) 8, 10

Knutson v. County of Maricopa
175 Ariz. 445, 857 P.2d 1299 (App. 1993) 7

Langelier v. Coleman
861 F.2d 1508 (11th Cir. 1988) 8

Mandel v. Bradley
432 U.S. 173, 97 S. Ct. 2238 (1977) 8

Massiah v. United States
377 U.S. 201 (1964) 12

McCambridge v. State
778 S.W.2d 70 (Tex. Crim. App. 1989) 9

McVeigh v. Smith
872 F.2d 725 (6th Cir. 1989) 8

Michigan v. Long
463 U.S. 1032 (1983) 7

Miranda v. Arizona
384 U.S. 436 (1966) 11

Moran v. Burbine
475 U.S. 412 (1986) 8, 9

Nyflot v. Commissioner of Pub. Safety
369 N.W.2d 512 (Minn. 1985) 9

Nyflot v. Minnesota Commissioner of Public Safety
474 U.S. 1027 (1985) 8

People v. Gursey
239 N.E.2d 351 (N.Y. 1968) 9, 10

People v. Okun
495 N.E.2d 115 (Ill. 1986) 9

Pompa v. Superior Court
187 Ariz. 531, 931 P.2d 431 (App. 1997) 7

Roberts v. State of Maine
48 F.3d 1287 (1st Cir. 1995) 8, 11

Rogala v. District of Columbia
161 F.3d 44 (D.C. Cir. 1998) 8

Scarborough v. State
261 So.2d 475 (Miss. 1972) 9

Schmerber v. California
384 U.S. 757 (1966) 8, 10

Schneckloth v. Bustamonte
412 U.S. 218 (1973) 10

Seders v. Powell
259 S.E.2d 544 (N.C. 1979) 9

Shillinger v. Haworth
70 F.3d 1132 (10th Cir. 1995) 12

South Dakota v. Neville
459 U.S. 553 (1983) 9, 10

State v. Birmingham
96 Ariz. 109, 392 P.2d 775 (1964) 7

State v. Carr
911 P.2d 774 (Idaho Ct. App. 1995) 9

State v. Degnan
409 S.E.2d 346 (S.C. 1991) 9

State v. Fitzsimmons
610 P.2d 893 (Wash. 1980) 9, 10

State v. Fletcher
149 Ariz. 187, 717 P.2d 866 (1986) 7

State v. Green
512 A.2d 429 (N.H. 1986) 9

State v. Heinz
983 F.2d 609 (5th Cir. 1993) 11

State v. Hoch
500 So.2d 597 (Fla. Dist. Ct. App. 1986) 8

State v. Jones
457 A.2d 116 (Me. 1983) 9

State v. Juarez
161 Ariz. 76, 775 P.2d 1140 (1989) 7

State v. Kanikaynar
939 P.2d 1091 (N.M. 1997) 9

State v. Mingledorff
713 S.W.2d 88 (Tenn. Crim. App. 1986) 9

State v. Retter
1999 WL 437070 (Wis. June 29, 1999) 9

State v. Vega
491 A.2d 797 (N.J. Super. Ct. App. Div. 1984) 9

State v. Welch
376 A.2d 351 (Vt. 1977) 9, 10

United States v. Ash
413 U.S. 300 (1973) 8–10

United States v. Gouveia
467 U.S. 180 (1984) 8–11

United States v. Laura
667 F.2d 365 (3rd Cir. 1981) 12

United States v. Marion
404 U.S. 307 (1971) 12

United States v. Morrison
449 U.S. 361 (1981) 11, 12

United States v. Rogers
751 F.2d 1074 (9th Cir. 1985) 12

United States v. Singer
785 F.2d 228 (8th Cir. 1986) 12

United States v. Wade
388 U.S. 218 (1967) 8, 12

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2 2
U.S. Const. amend. V 10
U.S. Const. amend. VI 3–5, 7–12
U.S. Const. amend. XIV 3, 8, 9

STATUTES

A.R.S. § 12–109 7
28 U.S.C. § 1254 2

RULES

Rule 6.1, Ariz. R. Crim. P. 7
Rule 10.1, Rules of Supreme Court 2

OPINION BELOW

On November 21, 1998, the Arizona Court of Appeals, holding that Respondent had been denied her right to counsel, issued its opinion reversing and remanding the trial court's ruling denying Respondent's motion to dismiss. A copy of the Arizona Court of Appeals' opinion is at Appendix A. The Arizona Supreme Court denied review of Petitioner's petition for review. A copy of the order denying the petition for review is at Appendix B. A copy of the Arizona Court of Appeals' order and mandate is at Appendix C.

STATEMENT OF JURISDICTION

Petitioner respectfully requests that a Writ of Certiorari issue to review the opinion of the Arizona Court of Appeals. (Appendix A.) The Arizona Court of Appeals issued its decision on November 24, 1998. On May 25, 1999, the Arizona Supreme Court denied Petitioner's petition for review. (Appendix B.) Petitioner timely filed the petition for writ of certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254; and Supreme Court Rule 10.1.

PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATEMENT OF THE CASE

Procedural History of the Case

On June 24, 1996, the State of Arizona charged Respondent with one count of driving under the influence with a suspended, canceled, revoked, refused, or restricted license; one count of driving with an alcohol concentration of .10 or more with a suspended, canceled, revoked, refused, or restricted license; and two counts of aggravated driving under the influence.

Respondent moved to dismiss the charges alleging, among other claims, that she was denied her Sixth Amendment right to consult an attorney before deciding to submit to an intoxilyzer test. The trial court held an evidentiary hearing on the motion and made the following findings:

> The Court finds that the defendant's right to counsel was not violated.
>
> After the defendant was stopped, she was asked some questions by the deputies. The defendant responded, "Ask my attorney." This was not an invocation of the right to counsel. At the sheriff's station trailer, the defendant did finally ask to contact an attorney, and she was given a reasonable opportunity to do so by telephone. The Court further finds that there was no violation of the defendant's Constitutional Right to Due Process. The defendant was not denied her right to gather exculpatory evidence.

The case proceeded to jury trial, and the jurors returned guilty verdicts for aggravated driving while under the influence of intoxicating liquor or drugs having been convicted twice for driving under the influence within 60 months of July 9, 1995, and for aggravated driving while under the influence of intoxicating liquor while license was suspended or revoked. The trial court suspended imposition of sentence and placed Respondent on probation for 5 years, conditioned upon serving 6 months incarceration in the county jail.

On appeal, Respondent argued that her Sixth Amendment right to counsel was violated because the arresting officer failed to provide a telephone number where her attorney could reach her. On November 24,

1998, the Arizona Court of Appeals vacated the trial court's order denying dismissal and remanded to the trial court with directions to dismiss, finding that the officer's failure to provide a telephone number at which Respondent's attorney could return her call violated her right to counsel.

Petitioner petitioned the Arizona Supreme Court for review. Petitioner argued that Respondent did not have a Sixth Amendment right to counsel prior to deciding whether to take a breathalyzer test, and furthermore, even if Respondent did enjoy a right to counsel, the proper remedy in a criminal prosecution for a violation of right to counsel is not dismissal, but rather suppression of the "tainted" evidence. On May 25, 1999, the Arizona Supreme Court denied review.

Facts of the Case

On the afternoon of July 9, 1995, Maricopa County Sheriff's Deputy Jim Andrysiak saw Respondent speeding in a black Mustang and crossing the double yellow line into oncoming traffic. Deputy Andrysiak activated his emergency lights, and with the use of hand signals out his window, directed Respondent to stop. Petitioner instead continued to drive, veering onto the north shoulder of the road for a distance of about 10 feet. Deputy Andrysiak continued pursuit of Respondent's car, and she eventually stopped.

Deputy Andrysiak approached Respondent and immediately noticed a strong odor of alcohol emanating from the car. Respondent's eyes were bloodshot and watery, and her speech was slurred. Deputy Andrysiak asked for Respondent's license, and she handed him an Arizona identification card. Pursuant to Deputy Andrysiak's request, Respondent got out of her car. She was unsteady and relied on the car for balance. Deputy Albert Macklin, who had arrived to assist, attempted to administer the field sobriety tests to Respondent. She was unsuccessful in her attempt to perform the tests, nearly falling to the ground. Respondent then refused to perform any of the tests. A preliminary breath sample was administered, indicating the presence of alcohol on Respondent's breath.

Respondent was then transported to the police station, where she was asked to take an intoxilyzer test. Respondent refused, and said she wished to speak with a lawyer. Deputy Andrysiak allowed Respondent to use the telephone and provided her with a telephone book. Respondent requested that Deputy Andrysiak give her the telephone number of the direct line of

the station, so that her attorney could return her call there. Deputy Andrysiak was unwilling to give Respondent the police station telephone number. Respondent was unable to reach an attorney. She then again refused to take the intoxilyzer test.

REASONS WHY THE WRIT SHOULD ISSUE

I

THERE IS A SUBSTANTIAL CONFLICT WHETHER THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL ATTACHES TO THE DECISION WHETHER TO SUBMIT TO BLOOD-ALCOHOL TESTING.

This Court should grant the petition for writ of certiorari because Arizona has decided an important federal question in a way that conflicts with the majority decisions of this Court, of several federal circuit courts of appeals, and other states that recognize that there is no Sixth Amendment right to counsel when deciding whether to take a blood-alcohol test because it does not involve the initiation of adversarial judicial criminal proceedings or certain critical pretrial proceedings.[1] In particular, Arizona has adopted the erroneous minority position that the decision whether to consent to testing involves a critical stage of the criminal proceedings, and therefore the Sixth Amendment right to counsel attaches. In addition, regardless of whether the majority or minority's position on when the right attaches is the proper approach, the proper remedy for a violation of the Sixth Amendment right to counsel is suppression of the tainted evidence, not dismissal. The Arizona opinion directly contradicts this Court's precedent on this latter point.

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1. In reaching its conclusion, the Arizona court referred to Rule 6.1 of the Arizona Rules of Criminal Procedure, which provides that a defendant has a right to consult with counsel as soon as feasible after a defendant is taken into custody. However, the rules promulgated by the Arizona Supreme Court can only affect procedural matters and may not diminish or augment substantive rights. A.R.S. § 12-109; *State v. Birmingham*, 96 Ariz. 109, 392 P.2d 775 (1964); *Pompa v. Superior Court*, 187 Ariz. 531, 534, 931 P.2d 431, 434 (App. 1997). Under Arizona law, court rules cannot create substantive rights, but rather establish a method for enforcing such rights. *State v. Fletcher*, 149 Ariz. 187, 191-92, 717 P.2d 866, 870-71 (1986); *Knutson v. County of Maricopa*, 175 Ariz. 445, 446, 857 P.2d 1299, 1300 (App. 1993). Therefore, Respondent was entitled to appointment of counsel only if the substantive right existed through the Constitution or state statute. *Espinoza v. Superior Court*, 166 Ariz. 557, 559, 804 P.2d 90, 92 (1991). In addition, Arizona case law has relied on and interpreted Supreme Court precedent in decisions concerning the right to counsel. *See, e.g. State v. Juarez*, 161 Ariz. 76, 80-81, 775 P.2d 1140, 144-45 (1989). Thus, in concluding that Respondent had a right to counsel, Arizona necessarily addressed the federal question of whether the Sixth Amendment right to counsel applies to the decision of whether to submit to blood-alcohol testing. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee "[i]n all criminal prosecutions, [that] the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The right to counsel attaches only upon the initiation of adversarial judicial criminal proceedings against the accused, including: (1) the formal charge, preliminary hearing, indictment, information, or arraignment; and (2) certain "critical stages" of pretrial proceedings where the accused is confronted by the procedural system, or by the expert adversary. *See Moran v. Burbine*, 475 U.S. 412, 428 (1986) (the right to counsel becomes applicable only when the government's role shifts from investigation to accusation); *United States v. Gouveia*, 467 U.S. 180, 189 (1984); *United States v. Ash*, 413 U.S. 300, 310-13 (1973); *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972); *United States v. Wade*, 388 U.S. 218, 225-27 (1967); *Rogala v. District of Columbia*, 161 F.3d 44, 55 (D.C. Cir. 1998); *Roberts v. State of Maine*, 48 F.3d 1287, 1290 (1st Cir. 1995).

It is well-established that there is no Sixth and Fourteenth Amendment right to counsel with respect to the decision whether to consent to a blood-alcohol test. *See Nyflot v. Minnesota Commissioner of Public Safety*, 474 U.S. 1027 (1985) (dismissing appeal for want of substantial federal question from Minnesota Supreme Court decision finding that there is no Sixth Amendment right to counsel regarding the decision whether to consent to testing)[2]; *Schmerber v. California*, 384 U.S. 757, 765-66 (1966) (no Sixth Amendment right to counsel in connection with blood-alcohol test); *Rogala*, 161 F.3d at 55 (no Sixth Amendment right to counsel during field sobriety tests); *Roberts*, 48 F.3d at 1290 (right to counsel had not attached at time refused to take blood-alcohol test because not a critical stage of criminal proceedings); *McVeigh v. Smith*, 872 F.2d 725, 728 (6th Cir. 1989) (no Sixth Amendment right to counsel with respect to the decision whether to consent to blood-alcohol test); *Langelier v. Coleman*, 861 F.2d 1508, 1511 (11th Cir. 1988) (no constitutional rights associated with decision of whether to consent to blood-alcohol test); *Brank v. State of Delaware*, 528 A.2d 1185, 1188 (Del. 1987); *State v. Hoch*, 500 So.2d 597, 599 (Fla. Dist. Ct.

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2. This Court's dismissal of the appeal in *Nyflot* operated as an adjudication of the case on the merits, which has binding precedential effect on other cases. *See Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 2240 (1977) (dismissals based on lack of substantial federal question reject the specific challenges presented in the statement of jurisdiction). *See also Hopfmann v. Connolly*, 471 U.S. 459, 460, 105 S. Ct. 2106, 2107 (1985) (per curiam) (dicta).

App. 1986); *Davis v. Pope*, 197 S.E.2d 861, 863 (Ga. 1973); *State v. Carr*, 911 P.2d 774, 776 (Idaho Ct. App. 1995); *People v. Okun*, 495 N.E.2d 115, 117 (Ill. 1986); *State v. Jones*, 457 A.2d 116, 1120 (Me. 1983); *Commonwealth v. Brazelton*, 537 N.E.2d 142, 143 (Mass. 1989); *Nyflot v. Commissioner of Pub. Safety*, 369 N.W.2d 512, 517 (Minn. 1985); *Albrecht v. Director of Revenue*, 833 S.W.2d 40, 41 (Mo. App. 1992); *State v. Greene*, 512 A.2d 429 (N.H. 1986); *State v. Vega*, 491 A.2d 797, 799 (N.J.Super. Ct. App. Div. 1984); *State v. Kanikaynar*, 939 P.2d 1091, 1094-95 (N.M. 1997); *Seders v. Powell*, 259 S.E.2d 544 (N.C. 1979); *Dobbins v. Ohio Bureau of Motor Vehicles*, 664 N.E.2d 908, 911-12 (Ohio 1996); *In re Kean*, 520 A.2d 1271, 1274 (R.I. 1987); *State v. Degnan*, 409 S.E.2d 346, 348 (S.C. 1991); *Department of Pub. Safety v. Gates*, 350 N.W.2d 59, 61 (S.D. 1984); *State v. Mingledorff*, 713 S.W.2d 88, 89 (Tenn. Crim. App. 1986); *McCambridge v. State*, 778 S.W.2d 70, 130 (Tex. Crim. App. 1989); *State v. Retter*, 1999 WL 437070, ¶28 (Wis. June 29, 1999).

However, Arizona and a minority of states have held, against this Court's precedent, that the Sixth and Fourteenth Amendments guarantee the right to counsel before deciding whether to submit to testing. *See Copelin v. State*, 659 P.2d 1206, 1213-14 (Alaska 1983); *Brosan v. Cochran*, 516 A.2d 970, 976 (Md. 1986); *People v. Gursey*, 239 N.E.2d 351, 352-53 (N.Y. 1968); *Scarborough v. State*, 261 So.2d 475, 478-80 (Miss. 1972); *State v. Welch*, 376 A.2d 351, 255-56 (Vt. 1977); *State v. Fitzsimmons*, 610 P.2d 893, 905, *vacated and remanded*, 449 U.S. 977, 101 S. Ct. 390, *aff'd* 620 P.2d 999 (Wash. 1980).

The established precedent that the right to counsel does not attach to the decision whether to consent to testing based on the reasoning that the decision does not involve the initiation of an adversarial judicial proceeding or a critical stage of the proceedings. *See Moran*, 475 U.S. at 430 (Sixth Amendment right to counsel attaches only when the government's role shifts from investigation to accusation); *Gouveia*, 467 U.S. at 189 (mere confrontation with a police officer, or even arrest, does not signal the initiation of adversarial proceedings). A critical stage in the proceedings against the accused arises when the accused needs aid in coping with legal problems or help in meeting a professional adversary. *Ash*, 413 U.S. at 310-13. The decision whether to take an alcohol test is not an act coerced by the police officer. *South Dakota v. Neville*, 459 U.S. 553, 559 (1983); *People v. Okun*, 495 N.E.2d 115, 117 (Ill. 1986). It is analogous to the sort

of physical or real evidence to which the Fifth Amendment privilege against self-incrimination do not apply. *Neville*, 459 U.S. at 565. For example, an accused has no right to consult counsel before submitting to a search or the drawing of a blood sample or before appearing in a lineup. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 238–40 (1973); *Schmerber*, 384 U.S. at 765–66; *Kirby*, 406 U.S. at 688–89. Nor does an accused, formally charged, have a right to counsel at a photographic display or when providing a handwriting exemplar because neither event is a "critical stage" of the prosecution. *Ash*, 413 U.S. at 310–13; *Gilbert v. California*, 388 U.S. 263, 267 (1967).

In the present case, Arizona has crossed this Court's bright-line rule by aligning itself with the erroneous minority position regarding the right to counsel. (Appendix A, at 3.) Arizona extends the right to counsel "as soon after arrest as feasible if such contact does not interfere with the matter at hand." (*Id.*) This directly contradicts the well-established precedent discussed above. "Soon after arrest" signals neither a critical stage of the proceedings nor the initiation of adversarial judicial proceedings. Thus, the expansion of the right to counsel by Arizona and the other adherents to the minority position is contrary to the view of this Court. *Gouveia*, 467 U.S. at 188 n.5. The minority has reasoned that once a defendant is placed into custody and asked to submit to testing, the criminal proceedings are initiated and the right to counsel attaches. *See Copelin*, 659 P.2d at 1213 (the choice to submit to alcohol testing is meaningful and will be binding in the subsequent proceedings); *Brosan*, 516 A.2d 970, 976 (whether to submit to testing is of critical importance); *Gursey*, 239 N.E.2d at 352–52 (police officer may not prevent contact with counsel in determining whether to submit to testing because decision affects significant legal right); *Welch*, 376 A.2d at 355 (decision to submit to test rises to level of critical stage because it will invariably affect the evidence that will be made available at trial and the presumptions to be drawn from that evidence); *Fritzsimmons*, 610 P.2d at 905 (decision whether to submit to blood-alcohol test involves a critical stage of the proceedings).

This Court has "never suggested that the purpose of the right to counsel is to provide a defendant with a preindictment private investigator." *Gouveia*, 467 U.S. at 191. That is exactly what Arizona and the minority position attempt to do when they hold that the right to counsel attaches as soon as the defendant is placed in custody and asked to submit to alcohol testing. This Court's jurisprudence on the Sixth Amendment allows for few

exceptions to its bright-line rule that the right to counsel does not attach until the government initiates official proceedings by making a formal charge. *See Roberts*, 48 F.3d at 1291; *State v. Heinz*, 983 F.2d 609, 612-13 (5th Cir. 1993). In fact, this Court has only deviated from the bright-line rule in two prior decisions: *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Gouveia*, 467 U.S. at 188, n.5 This Court has certainly not created an exception to its bright-line rule regarding the decision of whether to consent to testing in a drunk driving investigation. Rather, this Court, the federal circuit courts, and many state courts have concluded that the request that a suspect submit to blood-alcohol testing does not cross the constitutional divide between investigation and accusation, and therefore the right to counsel does not attach.

Clearly, Respondent had no Sixth Amendment right to counsel at the time she was asked to submit to testing, and Arizona has erred as a matter of federal law in joining the minority position in finding such a right. This Court should grant review to resolve the conflict between the majority and the minority views on this substantial issue of federal constitutional law.

II

THIS COURT SHOULD GRANT REVIEW TO DECIDE THE SUBSTANTIAL FEDERAL QUESTION IF WHETHER THE SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHES AS ESPOUSED BY THE MINORITY, THE PROPER REMEDY IS SUPPRESSION RATHER THAN DISMISSAL.

The general rule regarding deprivations of the Sixth Amendment is that the remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. As this Court stated, in *United States v. Morrison*, 449 U.S. 361, 364 (1981):

> [W]hen before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted.

See also Gilbert, 388 U.S. at 273–74; *Wade*, 388 U.S. at 225–27; *Massiah v. United States*, 377 U.S. 201 (1964); *Shillinger v. Haworth*, 70 F.3d 1132, 1140 (10th Cir. 1995); *United States v. Singer*, 785 F.2d 228, 232 (8th Cir. 1986); *United States v. Rogers*, 751 F.2d 1074, 1078 (9th Cir. 1985); *United States v. Laura*, 667 F.2d 365, 370 (3rd Cir. 1981). Furthermore, where there is no showing of demonstrable prejudice or substantial threat, dismissal of the charges is inappropriate, despite the fact that the violation may have been deliberate. *Morrison*, 449 U.S. at 365. *Cf. United States v. Marion*, 404 U.S. 307, 325–26 (1971). Absent that showing in the criminal proceeding, there is no basis for imposing dismissal as the remedy because the proceedings can go forward with full recognition of the defendant's right to counsel and to a fair trial. *Morrison*, 449 U.S. at 365.

Here, assuming there was a Sixth Amendment violation, the Arizona Court of Appeals dismissed the case inappropriately and in contradiction with federal law. The record does not suggest prejudice or substantial threat. The alleged violation should have been remedied by suppression of Respondent's refusal to take the test. For the Arizona Court of Appeals to now hold that dismissal is the appropriate remedy for all Sixth Amendment violations conflicts with well-established precedent of this Court. The goal is to neutralize the taint of the government's prior misconduct while preserving society's interest in prosecution of criminal activity by reversal and remand, not dismissal. *See Cook v. State of Texas*, 940 S.W.2d 623, 628 (Tex. Crim. App. 1996). If this Court permits the rule adopted by the Arizona Court of Appeals to stand, then society's interest in the prosecution of criminal activity will be undermined.

CONCLUSION

Based on the foregoing authorities and arguments, Petitioner respectfully requests this Court to grant the petition for writ of certiorari and reverse the decision of the Arizona Court of Appeals.

Respectfully submitted,

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CRM97-1524
100186

APPENDICES

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	
	)	1 CA-CR 97-0739
Appellee,	)	
	)	DEPARTMENT D
v.	)	
	)	
KIMBERLY I. SANDERS,	)	O P I N I O N
	)	
Appellant.	)	Filed 11-24-98
	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR 96-94049

The Honorable Brian K. Ishikawa, Judge

REVERSED AND REMANDED

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KLEINSCHMIDT, Judge

¶ 1 The Defendant appeals her conviction for aggravated driving while under the influence of intoxicating liquor or drugs. She claims that the arresting officer interfered with her right to an attorney by refusing to give her the number of the police station so that she could leave the number with her attorney's answering service. We conclude that the police did not give the Defendant a reasonable opportunity to contact her attorney.

¶ 2 On a Sunday afternoon in July 1995, a deputy sheriff stopped the Defendant for erratic driving. Based on the Defendant's behavior and appearance, the deputy suspected that she had been drinking. He arrested her and took her to the police station.

¶ 3 The amount of time that elapsed between events that occurred at the police station is not clear from the record, but at some point after arriving at the station, the deputy asked the Defendant to take a breathalyzer test. The Defendant refused and asked if she could call her attorney. According to the Defendant, as soon as she was given the telephone book and access to the telephone she called her attorney and got his answering service. The service requested a callback number so that her attorney could call her "right back." Since there was no number printed on the phone, the Defendant asked the deputy for a callback number and "they" refused to give her one. They told her there was no way for someone to call her back. At some point the Defendant wanted to try the attorney's number again and was not allowed to do so. The deputy then told the Defendant that she had no right to further delay the test, and the Defendant refused to take it.

¶ 4 The deputy could not remember the details of this incident, but he testified that he normally gives people a phone book and allows them twenty to twenty-five minutes to make a call before administering the test. He testified that he probably did not provide the Defendant with a callback number at the police station. He also testified that the station, which is basically a trailer, only had one telephone line and it was "extremely busy" at that time of year.

¶ 5 Before trial, the Defendant moved to dismiss on the grounds that she had been denied her right to counsel. The trial judge denied the motion on the grounds that the Defendant had been given a reasonable time to contact her attorney by telephone.

¶ 6 The general rule is that an accused has a right to contact an attorney as soon after arrest as feasible if such contact does not interfere with the matter at hand. *See McNutt v. Superior Court*, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982); Ariz. R. Crim. P. 6.1. This rule applies to a defendant's right to speak to counsel before taking a breathalyzer test. *See State v. Juarez*, 161 Ariz. 76, 81, 775 P.2d 1140, 1145 (1989) (refusal to allow defendant to call attorney before testing violated Sixth Amendment right to counsel); *Kunzler v. Pima County Superior Court*, 154 Ariz. 568, 569, 744 P.2d 669, 670 (1987) (defendant has right to consult with attorney as long as contact does not interfere with the investigation); *State v. Holland*, 147 Ariz. 453, 455, 711 P.2d 592, 594 (1985) (defendant has right to talk to attorney in private); *Martinez v. Superior Court*, 181 Ariz. 467, 468, 891 P.2d 934, 935 (App.1994) (even though officer did not give defendant a number at which attorney could call back, right to attorney not violated only because defendant and attorney conversed by using answering service as an intermediary).

¶ 7 The trial judge did not reject the Defendant's account of her efforts to contact her attorney as untrue. Nor is there any indication in the record that at the time the Defendant asked the deputy for a callback number there was a need to administer the breathalyzer test immediately. Instead it appears that the deputy refused to give the Defendant a number simply because only one telephone line was available, and it was frequently busy. The trial judge believed that the deputy was required to do nothing more.

¶ 8 The deputy did not provide the Defendant with a reasonable opportunity to consult her attorney. Even given the limited telephone facilities, there was no reason not to give the Defendant a callback number. It is entirely possible that had the deputy done so, contact could have been established within minutes.

¶ 9 The remedy for a violation of the right to counsel is dismissal. *See Holland*, 147 Ariz. at 456, 711 P.2d at 595. The conviction and sentence are vacated, and the matter is remanded to the trial court with directions to dismiss.

Thomas C. Kleinschmidt, Judge

CONCURRING:

Sheldon H. Weisberg
Presiding Judge

Sarah D. Grant
Judge

SUPREME COURT

NOEL K. DESSAINT
CLERK OF COURT

STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 West Washington Street
Phoenix, Arizona 85007-3231

KATHLEEN E. KEMPLY
CHIEF DEPUTY CLERK

May 26, 1999 Telephone (602-542-9396)

RE: STATE OF ARIZONA VS. KIMBERLY I. SANDERS
Supreme Court No. CR-99-0010-PR
Court of Appeals No. 1 CA-CR 97-0739
Maricopa County No. CR 96-94049

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 25, 1999, in regard to the above-referenced cause:

ORDERED: The State of Arizona's Petition for Review = DENIED.

Record returned to the Court of Appeals, Division One, Phoenix, this 26th day of May, 1999.

NOEL K. DESSAINT, Clerk

TO:
Hon. Janet A. Napolitano, Arizona Attorney General
ATTN: Paul J. McMurdie, Esq. and Scott B. Rosenberg, Esq.
Dean W. Trebesch, Maricopa County Public Defender
ATTN: James L. Edgar, Esq.
Kimberly Sanders, #1190, 15157 N 90th Pl, Scottsdale, AZ
Glen D. Clark, Clerk, Court of Appeals, Division One, Phoenix
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IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

Division One
Court of Appeals
State of Arizona
Filed: June 18, 1999

GLEN D. CLARK, CLERK
By: M. Soto

STATE OF ARIZONA,	)	
	)	1 CA-CR 97-0739
Appellee,	)	
	)	DEPARTMENT D
v.	)	
	)	MARICOPA County
KIMBERLY I. SANDERS,	)	Superior Court
	)	No. CR 96-94049
Appellant.	)	
	)	

ORDER AND MANDATE

Janet A. Napolitano, The Attorney General
By: Paul J. McMurdie, Chief Counsel, Criminal Appeals Section
and Scott B. Rosenberg, Assistant Attorney General
Attorneys for Appellee Phoenix

Dean W. Trebesch, Maricopa County Public Defender
By: James L. Edgar, Deputy Public Defender
Attorneys for Appellant Phoenix

The opinion of this court in the above matter was filed on November 24, 1998.

A petition for review was filed. The record was forwarded to the Arizona Supreme Court. By order, dated May 25, 1999, the Arizona Supreme Court denied the petition for review, Supreme Court No. CR-99-0010-PR.

IT IS ORDERED in conformity with the opinion attached hereto.

IT IS FURTHER ORDERED that a certified copy of the foregoing ORDER and MANDATE and a copy of the opinion of the Court were mailed to the Clerk of the Superior Court for MARICOPA County, Arizona, on June 18, 1999. A copy of the ORDER and MANDATE and a copy of the opinion were mailed to the Honorable Brian K. Ishikawa, Judge, and a copy of the ORDER and MANDATE was mailed on said day to each party appearing or the attorneys of record; as well as the MARICOPA County Attorney.

IT IS FURTHER ORDERED pursuant to this Court's order of the 11th day of March, 1965, that the Clerk of this Court return to the Clerk of Superior Court, all records, exhibits, and other matters received from said Clerk by this Court in aid of the consideration of this matter.

DATED June 18, 1999.

_____
VICE CHIEF JUDGE

All of the foregoing directives were
complied with June 18, 1999.

GLEN D. CLARK, Clerk
By

Marcos A. Soto
Deputy Clerk